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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 760

ELOISE ARMS FORSTER, AS ASSIGNEE OF STATE BANK AND TRUST COMPANY, EXECUTOR OF THE ESTATE OF ELIZABETH G. ARMS, DECEASED,

Plaintiff-Appellant,

vs.

E. J. SAUBER, DIRECTOR OF INTERNAL REVENUE, CHICAGO, ILLINOIS,

Defendant-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Defendant-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the decision of the District Court holding that defendant's motion for summary judgment on plaintiff's claim that certain annuity policies were not subject to the Federal Estate Tax should be granted, and plaintiff's motion for summary judgment be denied.

OPINIONS BELOW.

The Findings of Fact, Conclusions of Law and Judgment order of the District Court is printed as Appendix A. The opinion of the Court of Appeals is reported at 249 F. 2d 379, and is printed as Appendix B hereto.

JURISDICTION.

The judgment of the Court of Appeals is dated November 4, 1957, and was entered on that date. Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

QUESTION PRESENTED.

1. Are joint and survivor annuities similar to the annuities purchased by decedent in this case transfers taxable under Section 811 (c) (1) (B) or 811 (c) (1) (C) of the Internal Revenue Code of 1939, or are they taxable under both sections.

2. If these transfers are taxable under both sections of the law, or are taxable under Section 811 (c) (1) (B) alone, does Section 7 (a) (2) and 7 (b) of the Technical Changes Act of 1949 save them from taxation because the decedent has retained less than a 5% reversionary interest arising by the express provisions of the policies.

STATUTES INVOLVED.

Internal Revenue Code 1939.

> Sec. 811. *Gross Estate.*
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property • • •
>
> (c) (As amended by Sec. 7(a) of the Technical Changes Act of 1949. C. 720, 63 Stat. 891.) "Transfers in Contemplation of, or Taking Effect at Death.—
>
> "(1) GENERAL RULE.—To the extent of any interest

therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

"(A) in contemplation of his death. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter; or

"(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession of or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or

"(C) intended to take effect in possession or enjoyment at or after his death."

(The original act in the 1939 code consisted of the foregoing sections, Section 811 (c) (1) (B) being the section added March 4, 1931 and June 7, 1932, to counteract *May v. Heiner*. The Technical Changes Act of 1949 added the following sections to the Act.)

"(2) TRANSFERS TAKING EFFECT AT DEATH—TRANSFERS.

PRIOR TO OCTOBER 8, 1949.—An interest in property of which the decedent made a transfer, on or before October 7, 1949, intended to take effect in possession or enjoyment at or after his death shall not be included in his gross estate under paragraph (1) (C) of this subsection unless the decedent has retained a reversionary interest in the property, arising by the express terms of the instrument of transfer and not by operation of law, and the value of such reversionary interest immediately before the death of the decedent exceeds 5 per centum of the value of such property.

For the purposes of this paragraph, the term 'reversionary interest' includes a possibility that property transferred by the decedent (A) may return to him or his estate, or (B) may be subject to a power of disposition by him, but such term does not include a possibility that the income alone from such property may return to him or become subject to a power of disposition by him. The value of a reversionary interest immediately before the death of the decedent shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, pursuant to regulations prescribed by the Commissioner with the approval of the Secretary. In determining the value of a possibility that property may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such property may return to the decedent or his estate. * * * (b) The amendment made by subsection (a) shall be applicable with respect to estates of decedents dying after February 10, 1939. The provisions of section 811 (c) of the Internal Revenue Code, as amended by subsection (a), shall (except as otherwise specifically provided in such section or in the following sentence) apply to transfers made on, before, or after February 26, 1926. The provisions of section 811(c) (1) (B) of such code shall not, in the case of a decedent dying prior to January 1, 1950, apply to—

(1) a transfer made prior to March 4, 1931; or

(2) a transfer made after March 3, 1931, and prior to June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

No interest shall be allowed or paid on any overpayment resulting from the application of subsection (a) with respect to any payment made prior to the date of the enactment of this Act."

HISTORICAL BACKGROUND OF THE STATUTES INVOLVED.

The first statute taxing transfers made during life was Section 202 of the Revenue Act of 1916, which imposed a tax upon trusts made by a decedent intended to take effect in possession or enjoyment at or after his death. Similar provisions were continued in subsequent revenue acts. The Treasury Department took the position that a transfer under which a decedent retained for his life the possession of or enjoyment of or the right to the income from the property transferred, constituted a transfer taxable under this section of the law as a transfer intended to take effect in possession or enjoyment at or after decedent's death.

In 1930, the Supreme Court in the case of *May* v. *Heiner*, 281 U. S. 238, repudiated this interpretation of the law and held that such a transfer was not made to take effect in possession and enjoyment at death. Thereafter, by joint resolution, in 1931 and by an amendment in 1932, Congress added a provision to the law which taxed such transfers. This was held to be not retroactive so that the law of *May* v. *Heiner* was still applicable to pre-1931 transfers.

This was the status of the law when two decisions were rendered on the same day by the Supreme Court in 1949, *Commissioner* v. *Church*, 335 U. S. 632 and *Spiegels Estate* v. *Commissioner*, 335 U. S. 701. In the *Church* case, the Court split with three judges dissenting. The case involved the taxability of a pre-1931 transfer, with a retained life interest. The majority of the Court overruled *May* v. *Heiner* and held that it was not entitled to the "sanctuary of *stare decisis*." The majority opinion concluded as follows: "We hold that this trust agreement, because it reserved a life income in the trust property, was intended to take effect in possession or enjoyment at the settlor's

death and that the Commissioner therefore properly included the value of its corpus in the trust estate."

On the same day in the *Spiegel* case it was decided by a 6 to 3 decision that Spiegel had made a transfer during life which was taxable under the possession and enjoyment clause because of an almost indistinguishable possibility of revertor which arose by operation of law and not by the express terms of the transfer. In the *Church* case the government also had claimed the transfer taxable because of a remote possibility of revertor. However, in its opinion the Court did not pass on this aspect of the case, but decided that the transfer was taxable as a transfer taking effect in possession and enjoyment at death solely because of the reservation in life income.

Following these decisions, Congress passed the Technical Changes Act of 1949, which excused from taxation under Section 811 c(1)C the possession and enjoyment clause, all transfers made before October 8, 1949, which did not have a reversionary interest or the possibility of one created by the express terms of the instrument of transfer, worth more than 5% of the value of the property immediately before the death of decedent.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I. The Statutes Involved Are of Great Public Importance and Should Be Interpreted by the Supreme Court.

Section 7 of the Technical Changes Act was passed as a direct result of the holdings of the Supreme Court in *Commissioner* v. *Church*, 335 U. S. 632 and *Spiegels Estate* v. *Commissioner*, 335 U. S. 701.

Following the decision of *May* v. *Heiner*, 281 U. S. 238, in 1931, which excluded transfers with a retained life interest from taxation as transfers taking effect in possession

or enjoyment at or after death, and the passage by Congress, March 4, 1931 and June 7, 1932 of the additional paragraph of the Revenue Act, which specifically taxed transfers with a retained life interest, the law was in a great state of confusion.

The new paragraph was held not retroactive in *Hasset* v. *Welch*, 303 U. S. 303 and hence it became necessary in the case of pre-1931 transfers to determine in applicable cases whether the transfer was a transfer with a retained life interest or whether it was a transfer which took effect in possession and enjoyment at or after death. This caused a great deal of confusion in the law and it is impossible to reconcile many of the decisions of the various courts with each other.

As a result of this confusion, the Supreme Court, in an apparent effort to clarify the situation and simplify the law, rendered its opinion in *Commissioner* v. *Church*, 335 U. S. 632, the concluding sentence of which stated:

> "We hold that this trust agreement, because it reserved a life income in the trust property, was intended to take effect in possession and enjoyment at the settlor's death and that the Commissioner therefore properly included the value of its corpus in the estate."

The effect of this decision was to return transfers encompassed by Section 811 (c) (1) (B) to their original state prior to *May* v. *Heiner*, 281 U. S. 238, as transfers taking effect in possession or enjoyment at or after death and to make unnecessary this section of the law.

Section 7 (b) of the Technical Changes Act of 1949 contains the following provisions:

> "The provisions of Section 811 (c) (1) (B) of such code shall not, in the case of a decedent dying prior to January 1, 1950, apply to—
>
> (1) a transfer made prior to March 4, 1931; or
>
> (2) a transfer made after March 3, 1931, and

> prior to June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516.)"

This provision does not say that Section 811 (c) 1 (c) shall not apply to these transfers, and the result is that because of the decision in *Commissioner* v. *Church*, pre-1931 transfers which were non-taxable because they were transfers with a retained life interest, became taxable provided there was a sufficient retention of a revisionary interest. This was recognized by the Circuit Court of Appeals for the 7th Circuit in the case of *Costin* v. *Crise*, 235 F. 2d 162. In this case the transfer was made on October 20, 1923. On page 165, Judge Lindley in his opinion said:

> "We think it clear that it was the intent to tax, under Section 811 (c) (2), all transfers dated prior to October 8, 1949, where possession or enjoyment of ultimate beneficiaries could be had only by surviving the decedent and the latter expressly retained a reversionary interest worth more than 5% of the property conveyed. Inasmuch as the decedent retained the income for life, plus a power of disposition of principal worth more than this part, it follows that the decedent retained the substantial interest in the transferred property mentioned by Congress and that no relief was afforded by section 7 of the Technical Changes Act of 1949. *Morristown Trust Co.* v. *Manning*, D. C., 104 F. Supp. 621, affirmed 3 Cir., 200 F. 2d 194, certiorari denied 345 U. S. 939, 73 S. Ct. 829, 97 L. Ed. 1365; *Estate of Slade* v. *Commissioner*, 15 T. C. 752, reversed on other grounds, 2 Cir., 190 F. 2d 689; *Estate of Hill* v. *Commissioner*, 23 T. C. 588, affirmed 2 Cir., 229 F. 2d 237."

We agree with the holding of the Court and with the reasoning set forth, but we think the same reasoning applies to the instant case where the secondary annuitant can

receive nothing unless she survives her Mother, and there is no retention of a reversion.

Apparently, Judge Lindley feels that this reasoning does not apply to our case because it involved a transfer made after the acts of March 4, 1931 and June 7, 1932 and that because the law says: "The provision of Section 811 (c) (1) (B) of such code shall not, in the case of a decedent dying prior to January 1, 1950, apply to—

(1) A transfer made prior to March 4, 1931, etc. • • • that the inference is that Section 811 (c) (1) (B) shall apply to transfers made after March 4, 1931.

It seems to us that this completely destroys the purpose of the law. Under this construction all pre-1931 transfers with a retained life interest are now transfers that pass in possession or enjoyment at or after death and are taxable unless the required reversionary interest is lacking, but in transfers made after March 3, 1931, the old difference is still to apply between the two forms of transfer, and if a transfer can be said to have a retained life interest, as described in Section 811 (c) (1) (B) it is taxable whether there is any reversion or not.

Furthermore it will be noted that in the instant case the decedent died after January 1, 1950, so that if the court's construction in the instant case is accepted, then in the estates of people dying after January 1, 1950, all transfers coming under the "retained life interest" clause made before October 8, 1949, are taxable whether pre-1931 transfers or not and regardless of a reversionary interest.

It seems to us that this is a warped and unnatural interpretation of the new act; that it was the intention of Congress to place the transfers encompassed by the two sections of the law back on the same basis they had been prior to the decision in *May* v. *Heiner*, 281 U. S. 238, as transfers passing in possession or enjoyment at or after death, and to make their taxation depend upon whether

or not the required reversionary interest existed. The quoted sentence was evidently placed in the act to make it retroactive as well as prospective.

In the next few years many transfers made prior to October 8, 1949, will be questioned and an interpretation of the new law now by the Supreme Court will prevent much litigation. The Treasury Department and the Attorney General should welcome such an interpretation.

II. The Conflicts Between the Various Circuits Should Be Resolved by the Supreme Court.

One of the first decisions rendered on the new act was in *Higgs Estate* v. *Commissioner*, 184 F. 2d 427. The case was started in the Tax Court. The annuity in question arose under an employee pension contract, under which the employer had paid the premiums. In 1934, under an option granted thereunder, the deceased elected to receive a lesser annuity to gain for his wife a survivorship annuity. The government claimed that the annuity was taxable under Sec. 811 (c) without specifying whether it was a transfer under Sec. 811 (c) (1) (B) or Section 811 (c) (1) (C). The Tax Court held, 12 T. C. 281-2, the annuity taxable under this section of the statute. After the case reached the Court of Appeals, the Technical Changes Act was passed. The government conceded that there was no reversionary interest, but claimed that the transfer was still taxable because it was a transfer coming within the purview of Sec. 811 (c) (1) (B). The taxpayer claimed there had been no transfer of property and hence the annuity did not come under the act at all. The Tax Court split on the question of whether there had been a transfer of property with the majority deciding that there had been such a transfer.

The Court of Appeals for the 3rd Circuit held that there was no reason to determine whether there had been a

transfer or not, because if it decided that there had been a transfer, it would not be taxable under Section 811 (c) as amended in 1949.

Another case which arose at about the same time was *Estate of Pruyn* v. *Commissioner*, 184 F. 2d 971—2d Cir. The government claimed that joint and survivor annuities were taxable even though they had been purchased prior to 1931, because they were transfers coming under Sec. 811 (c) (1) (C). The estate claimed the transfers came under Sec. 811 (c) (1) (B) and hence escaped taxation under *May* v. *Heiner*. The case was originally started in the Tax Court 12 T. C. 754. At page 757 the Tax Court said:

> "The consequence is that decedent's arrangement with the insurance companies whereby the transfer of her funds resulted in a postponement of the benefit conferred upon her sister until after decedent's death constituted a transfer, intended to take effect at death, of her property of which she retained the enjoyment during her lifetime. *Commissioner* v. *Wilder* (C. C. A., 5th Cir.), 118 Fed. (2nd) 281; certiorari denied, 314 U. S. 634; *Commissioner* v. *Clise* (C. C. A., 9th Cir.), 122 Fed. (2nd) 998; certiorari denied, 315 U. S. 821; *Mearkle's Estate*, 45 B. T. A. 894; affd. (C. C. A., 3d Cir.), 129 Fed. (2d) 386; *Estate of William J. Higgs*, 12 T. C. 280."

While the case was awaiting decision before the tax court, the Supreme Court decided *Commissioner* v. *Church*. After this added decision the tax court said there could be no doubt about the matter. The estate appealed to the United States Court of Appeals for the second circuit. While the appeal was pending, the Technical Changes Act of 1949 was passed. The Court of Appeals subsequently affirmed the holding of the tax court that the transfer was a transfer which took effect in possession or enjoyment at or after death, but held that because of the provision regarding a reversionary interest in the act, the transfer was no longer taxable.

In the instant case the government claims that the authorities cited in the Tax Court's decision of the *Pruyn* case, hold that joint and survivor annuities are transfers with a retained life interest. At page 5 of its brief the government made the following statement:

> "The courts have uniformly held that the purchase of survivorship annuity contracts (where the purchaser is the initial life annuitant, as here) effects a transfer of property as to which the decedent 'has retained for his life • • • the • • • enjoyment of • • • the property' within the meaning of Section 811 (c) (1) (B). See *Commissioner* v. *Clise*, 122 F. 2nd 998 (C. A. 9th), certiorari denied, 315 U. S. 821; *Mearkle's Estate* v. *Commissioner*, 129 F. 2d 386 (C. A. 3d); *Grant* v. *Smyth*, 123 F. Supp. 771 (N. D. Cal.), affirmed per curiam, 226 F. 2d 407 (C. A. 9th); *Pruyn's Estate* v. *Commissioner*, 184 F. 2d 971, 972 (C. A. 2d); see also, *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281 (C. A. 5th), certiorari denied, 314 U. S. 634."

A reading of the court's opinion in the instant case shows that the court agreed with this statement of the authorities.

As one of its authorities, the government cites *Grant* v. *Smyth*, 123 F. Supp. 771 (N. D. Cal.), affirmed per curiam, 226 F. 2d 407 (C. A. 9th). This was the first case in which the government claimed initially that joint and survivor annuities were transfers coming under Section 811 (c) (1) (B). The case originated in the Northern District of California, Southern Division. It was decided after the *Pruyn* case. The taxability of annuities such as the ones here involved was one of the questions passed on.

Plaintiff contended that this was a transfer "intended to take effect in possession or enjoyment at or after his death" and since the transfer was made prior to October 7, 1949, it was not includible in the gross estate. The court decided that the annuity was includible in the gross estate. At page 772 the court said:

> "Were this question presented to the Court for the first time with no prior authority the Court would be inclined to believe that there was considerable merit in plaintiff's contention that this was a transfer intended to take effect in possession or enjoyment after death and not a transfer wherein grantor retained for life any possession or enjoyment thereof or the right to the income therefrom. However, the Ninth Circuit has held, and this is binding on this Court, that such a transfer is includible in the gross estate."

The foot note shows that the case alluded to by the court was *Commissioner* v. *Clise*, 122 Fed. 2d 998 (9th Cir.).

The last case we can find on the subject comes from the same district as *Grant* v. *Smyth*. The title of the case is *M. Libbey* v. *United States* 147 Fed. Sup. 383. It was decided by the district judge. This case involved the taxability of annuities in the estate of an employee who had obtained an annuity for his widow by failing to exercise an option. On page 384 the court says:

> "If Libbey had purchased the ten-year annuity with his own funds, the purchase would have constituted a transfer intended to take effect in possession or enjoyment at death. *Commissioner of Internal Revenue* v. *Clise*, 9 Cir., 1941, 122 F. 2d 998; *Commissioner of Internal Revenue* v. *Wilder's Estate*, 5 Cir., 1941, 118 F. 2d 281; *Mearkle's Estate* v. *Commissioner*, 3 Cir., 1942, 129 F. 2d 386."

From a consideration of these various cases, it seems to us as though the law is in a hopeless state of confusion and that the Supreme Court should pass upon the controversy and first of all determine (1) Does the Technical Changes Act of 1949 excuse from taxation transfers without the required reversionary interest, made before October 8, 1949 and after March 3, 1931, which before the passage of the act were taxable if they were held to be transfers coming under either Sec. 811 (c) 1 (B) or Sec. 811 (c) 1

(C). (2) If the answer to this is "No, transfers coming under 811 (c) 1 (B) are still taxable", then the Supreme Court should determine whether or not joint and survivor annuities are transfers with a retained life interest coming under Sec. 811 (c) 1 (C), or transfers which take effect in possession or enjoyment at death, coming under Sec. 811 (c) (1) (B), or both.

CONCLUSION.

For the foregoing reasons, it is requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-993) * *

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ORDER.

The above-entitled Civil Action came on before the undersigned Judge on cross-motions for summary judgment. Plaintiff's motion for summary judgment was filed on July 27, 1956, and defendant's motion was filed on August 27, 1956. A stipulation was entered into between the parties whereby the plaintiff conceded the valuation placed upon the two annuity policies here in question by the defendant, the issue before the Court thereby being narrowed to the question of whether the two annuity policies in question constituted part of the gross estate of decedent Elizabeth G. Arms under the applicable provisions of the Internal Revenue laws. A stipulation of facts was presented by the parties, and briefs in support of the parties' motions for summary judgment were submitted.

Findings of Fact.

The Court finds the following facts in accordance with the stipulation of facts presented by the parties:

1. Decedent Elizabeth G. Arms died testate on October 25, 1951, a resident of the City of Evanston, Cook County, Illinois, which is situated in the Northern District of Illinois, Eastern Division, and Letters Testamentary were issued to plaintiff's assignor, the State Bank and Trust Company of Evanston, Illinois.

2. Plaintiff, Eloise Arms Forster, is the assignee of the

State Bank and Trust Company, as Executor of the estate of Elizabeth G. Arms; that she was the daughter of Elizabeth G. Arms and is the sole heir of said deceased and is also the sole legatee of the residuary estate of said Elizabeth G. Arms and is a proper plaintiff.

3. On December 13, 1948, the Deceased, Elizabeth G. Arms purchased from the Travelers Insurance Company of Hartford, Connecticut, a single premium sequential annuity contract No. 2451982; that the single premium for said policy amounted to the sum of $38,872.13 and was paid by Elizabeth G. Arms; that said contract provided for the payment monthly of an annuity of $125.00 to Elizabeth G. Arms during her lifetime; that at her death the annuity was to continue to be paid to Eloise R. Forster for the balance of her lifetime, and that at the death of the survivor of the two, all obligation of the Company was to cease.

4. On April 28, 1949, a similar single premium annuity policy No. 01855534 was issued by the John Hancock Mutual Life Insurance Company to the deceased, with Eloise Arms Forster as surviving beneficiary; that the single premium for said policy amounted to $38,872.50 and was paid by Elizabeth G. Arms, and that the policy provided for the payment of a monthly annuity of $125.00 until the death of the survivor of the two.

5. The State Bank and Trust Company, as Executor of the estate of Elizabeth G. Arms, filed an estate tax return for the estate on January 22, 1953, and included in that return the two annuities that have been described at a valuation of $19,963.50; for the interest at death of the annuity issued by the Travelers Insurance Company and a valuation of $20,373.00 for the interest at death of the annuity issued by the John Hancock Mutual Life Insurance Company, and paid to the Director of Internal Revenue the sum of $22,472.59 as the estate tax due on said return.

6. Following the filing of this estate tax return on December 13, 1948, the Executor filed a gift tax return for the Deceased for the year 1948 and included therein, among other items, the interest of Eloise Arms Forster in the annuity purchased from the Travelers Insurance Company of Hartford, Connecticut, at a valuation of $20,353.50, and paid the tax assessed by the Treasury Department, plus interest thereon on June 14, 1954.

7. The Executor also filed a gift tax return for decedent for the year 1949, including in this return, among other items, the interest of Eloise Arms Forster in the annuity contract purchased from the John Hancock Mutual Life Insurance Company at a valuation of $20,353.60, and paid the tax assessed on said return by the officials of the Treasury Department, together with interest thereon, on June 14, 1954.

8. Thereafter, the officials of the Treasury Department assessed the Federal Estate Tax on the gross estate of the decedent and included in said gross estate the value at death of the annuity policy issued by the Travelers Insurance Company as being $35,935.82, and the value at death of the annuity policy issued by the John Hancock Life Insurance Company as being $35,876.00. In computing the tax due, said Treasury officials allowed the plaintiff a credit in the amount of $7,323.93 for the gift taxes paid.

9. Following the payment of the gift tax and the federal estate tax, on September 15, 1954, the State Bank and Trust Company, as Executor of the estate of Elizabeth G. Arms, filed a claim for refund in connection with said estate tax, claiming, among other things, that the value of the two annuities heretofore described should not have been included in the gross estate for estate tax purposes. The Commissioner of Internal Revenue denied the claim.

10. The plaintiff has withdrawn all claims arising from the inclusion of the proceeds of Life Insurance Policy

#1439019 issued by the Massachusetts Mutual Life Insurance Company on the life of Elizabeth G. Arms, in decedent's gross estate for estate tax purposes, as set forth in paragraphs 10, 11 and 12 of the complaint.

11. The plaintiff has stipulated that the valuations placed by the Treasury officials upon the two other annuity policies for the estate tax are correct.

12. At the date of death of the decedent the value of the Travelers Insurance Company annuity was $35,935.82, and the value of the John Hancock Mutual Life Insurance Company annuity was $35,876.00.

13. The Travelers Insurance Company annuity and the John Hancock Mutual Life Insurance Company annuity were part of the decedent's gross estate for estate tax purposes, and the additional estate tax assessed by the defendant and paid by the plaintiff, was properly assessed and paid.

Conclusions of Law.

1. This Court has jurisdiction of this cause of action and of the parties to the action.

2. The value of the Travelers Insurance Company annuity at the date of death of the decedent was $35,935.82, and the value of the John Hancock Mutual Life Insurance Company annuity was $35,876.00, these values representing the replacement cost at the date of death.

3. The value of the annuity contracts in question constituted property in which the decedent had an interest and of which the decedent made a transfer under which she retained for her life the possession and enjoyment and the right to income from such property.

4. The value of the annuity contracts here in question constituted part of the decedent's gross estate under Section 811(c) (1) (B) of the Internal Revenue Code of 1939, as amended.

5. The provisions of Section 7(b) of the Act of October 25, 1949, c. 720, 63 Stat. 891 (The Technical Changes Act) are not applicable to the situation here involved and do not require the exclusion of the value of the annuities in question from the gross estate of the decedent.

6. Section 7(b) of the Technical Changes Act pertains to and limits only Section 811(c) (1) (C) of the Internal Revenue Code of 1939 and does not qualify or limit Section 811(c) (1) (B) of that Act.

7. The Commissioner of Internal Revenue correctly determined that the gross estate of the decedent included the replacement value of the two annuity contracts here in question at the time of the death of the decedent.

8. The defendant did not err in assessing and collecting the estate taxes claimed by the plaintiff in this suit.

9. Defendant's motion for summary judgment is hereby granted and judgment should be entered in favor of the defendant together with the costs of this action.

This 27th day of March, 1957.

JOHN P. BARNES,
Judge

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—55-C-993) * *

JUDGMENT ORDER.

Now, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff's motion for summary judgment is overruled, that defendant's motion for summary judgment is granted, and that judgment be entered for the defendant dismissing this action with prejudice and granting defendant his costs.

This 27th day of March, 1957.

JOHN P. BARNES,
Judge.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 12074. September Term and Session, 1957.

ELOISE ARMS FORSTER, as Assignee of STATE BANK AND TRUST COMPANY, Executor of the Estate of Elizabeth G. Arms, Deceased,
Plaintiff-Appellant,
vs.
E. J. SAUBER, Director of Internal Revenue, Chicago, Illinois,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 4, 1957.

Before DUFFY, *Chief Judge*, FINNEGAN and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* The only question raised in this appeal from a decision of the United States District Court is whether, under Section 811(c)1(B) of the Internal Revenue Code of 1939, 26 U. S. C. (1952 Ed.), Sec. 811, the gross estate of the decedent for federal tax purposes includes the value, at the date of the decedent's death, of two survivorship annuity contracts, which she purchased during her lifetime.

The decedent, Mrs. Elizabeth Arms, in December, 1948, and April, 1949, purchased two annuities, one from the

Travelers' Insurance Company for a premium of $38,872.13, and one from John Hancock Mutual Life Insurance Company for a single premium of $38,872.50. Under each, the decedent was to receive an annuity during her lifetime and, upon her death, her daughter, plaintiff in this cause, Eloise Arms Forster, was to receive the annuity until the date of her death. The district court held that the value of each policy, which is not in controversy, should be included in the gross estate of the decedent for federal estate tax purposes, and entered judgment for defendant. Plaintiff has appealed, urging that the annuities should not be included as transfers retaining life estates, but that they should be included as transfers intended to take effect in possession or enjoyment at the death of the transferor.

Before discussing the issues, we should add that the executor made gift tax returns and paid a gift tax on each of the policies after Mrs. Arms died. The Commissioner, in determining deficiencies, allowed a credit upon the estate tax for the amount of gift taxes paid. The tax assessed was paid, whereupon this suit to recover was instituted.

Section 811(c)1 of the Internal Revenue Code of 1939 makes it necessary to include in a decedent's gross estate the value of all property of which the decedent has at any time made a transfer "(B) under which he has retained for his life * * * the possession of or enjoyment of or the right to the income from, the property" transferred, and (C) all such transfers "intended to take effect in possession or enjoyment at or after his death", and as we have said, our sole question is whether the Commissioner properly concluded and the trial court held that these annuities were governed by transfers defined under (B).

It seems to us crystal clear that the very terms of the statute require inclusion of the transfers, inasmuch as the grantor has retained the economic enjoyment of the contracts for life, since each annuity provided expressly

that the purchaser retained the income for as long as she lived, and that, upon her death, it would be paid to her daughter during the latter's lifetime. Agreeing with our conclusion is the opinion of the Ninth Circuit, in *Commissioner* v. *Clise*, 122 F. 2d 998, cert. den. 315 U. S. 821. There, the court said (pp. 1003, 1004): "Unquestionably, Mrs. Clise, the first annuitant, reserved to herself the enjoyment—the economic benefit, of these contracts during her lifetime. * * * it follows that the decedent had reserved a life estate in the proceeds of the contracts, which would leave the value of the respective contracts taxable to her, * * * '* * * of which [decedent] has at any time made a transfer, * * * under which he has retained for his life * * * the * * * enjoyment of * * * the property, * * *.' The word 'transfer', said the Supreme Court in *Chase Nat. Bank* v. *United States*, 278 U. S. 327, 337, * * *, 'must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another.' * * * It is not coining a phrase to say that taxation is a practical matter, dealing with practical problems. The practical effect of the annuity contracts was to reserve to Mrs. Clise the enjoyment of the property transferred and to postpone the fruition of the economic benefits thereof to the second annuitants until her death." This case was followed by *Mearkle's Estate* v. *Commissioner*, 129 F. 2d 386 (CA-3), where the court adopted the reasoning of the Ninth Circuit, saying (p. 388): "We agree with that court that the practical effect of such annuity contracts is to reserve to the annuitant the enjoyment of the property transferred and to postpone the fruition of the economic benefits to the second annuitant until after the death of the first * * *" and by *Grant* v. *Smyth*, 123 F. Supp. 771. See also *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281 (CA-5), cert. den. 314

U. S. 634. From the statute and from these decisions, we see no escape from the conclusion that these contracts retained a life interest in the grantor and provided that upon her death the remainder should pass to a designated grantee and must, therefore, be included in the gross estate.

It is true that there seems to be some overlapping of the two classes of transfers mentioned in the statute, (B), including all transfers in which a definite interest is retained in the grantor, which expires upon her death, and (C) including transfers made in contemplation of death. This apparent overlapping is understandable when the history of Federal estate tax decisions is considered. When the Supreme Court held that certain transfers were not includable, Congress amended the statute, and, later, because of what it deemed an exigency, passed the Technical Changes Act. The statute to which we have referred is the presently controlling one. It seems to us immaterial that certain transfers may be found within the classification of both (B) and (C); the important feature of this case is that the facts bring it exactly and flatly within (B) rather than (C). So, as the Fifth Circuit decided in *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281, cert. den. 314 U. S. 634, it is immaterial whether the purchaser of a survivorship annuity contract effects also a transfer under (C) insofar as the application of Section 811(c)1 is concerned. The fact that the annuities were includable under paragraph (B) is sufficient to justify the Commissioner's and the trial court's decision.

Apparently, the tax payer contends that the transfers should be considered as taking effect, in possession and enjoyment after death and not includable in the gross estate unless the grantor, the decedent, reserved an interest in the remainder of the transferred property, the value of which exceeded 5% of the property immediately

before decedent's death. We think that it does not follow that these transfers should be so classified for the reason that they were transfers of property in which the decedent retained a life interest and nothing after that.

Plaintiff relies upon *Pruyn's Estate* v. *Commissioner*, 184 F. 2d 971 (CA-2). We think the citation is inapposite. In that case decedent purchased similar annuity contracts prior to 1931 and the transfer could not be included in the decedent's gross estate because Section 7 of the Technical Changes Act of 1949 specifically made Section 811(c)1(B) of the code inapplicable to transfers prior to 1931, whereas, in the present case, the transfers were made in 1948 and 1949. Plaintiff seems to find comfort also in *Higg's Estate* v. *Commissioner*, 184 F. 2d 427 (CA-3). However, in that case, the transferor, the decedent, had not purchased the annuity, but it had been bought by his employer who paid the premium. The only transfer the decedent made was that, by exercising an option to take a lesser annuity, he thereby provided an additional annuity for the remainderman. The court held that his acts did not amount to a transfer under (B), but rather were controlled by (C). If the decision is properly interpreted as applying to the instant case, we cannot agree with it.

The judgment is

AFFIRMED.